IN THE SUPREME COURT OF THE UNITED STATES

No. [redacted] 97

THE UNITED STATES,
Petitioner,

VERSUS.

JEFF W. MOORMAN and JAMES C. MOORMAN, copartners, doing business as J. W. MOORMAN & SON,
Respondents.

REPLY BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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JULY, 1949.

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Respondents through their attorneys oppose the suance of *Certiorari* to review the judgment of the Court f Claims entered in the above entitled matter on March 7, 949.

QUESTION PRESENTED

On page 2 of the Brief of Petitioner is set forth their tatement as to question presented. As written, it is a eautiful hypothetical question, which, in all probability,

the Solicitor General desires answered, but it is not the question presented by this case. The question presented in this case is:

> Does an apparently inconsistent clause (Par. 2-16) (R. 10) in the specifications which is attached to the U. S. Standard Form Contract No. 23 Rev. change the meaning of a regular clause (Article 15), (R. 9) in the Contract as regards disputes concerning questions of fact, and if so, under the circumstances of this case, does it justify or permit a ruling by the engineer on a matter of law as to whether there was actually a contract concerning the extra work required to be done off the site as set forth in the contract and specifications, and not merely a question of fact as to the work to be done thereunder?

STATEMENT

The statement as set forth in the Petition at page 4 is not complete nor entirely accurate. It is not merely a question or dispute that arose regarding the grading of a taxiway being called for by the Contract, but more accurately whether there was ever any contract for the grading of a taxiway which was outside the area or boundary of the site on which the project and work were to be done, as set forth in the Contract and specifications. This will be more clearly set forth in our statement hereinafter set forth.

RESPONDENTS' STATEMENT OF FACTS

On April 4, 1942, Petitioner and Respondents entered into a contract by Letter of Intent (R. 5), by which the Respondents were to move "approximately one million cubic yards of grading (excavation) at the *site of the Okla-*

homa City Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof or which will be furnished to you prior to April 8, 1942."

Formal Contract (R. 7) was entered into, dated April 3, 1942, the front page of which stated:

> *"Contract for grading plant site. Place: Oklahoma City Aircraft Assembly Plant,"* and the body of the Contract provided that the contractor shall furnish the materials and "perform the work for *grading the site* of the Oklahoma City Aircraft Assembly Plant, and to be in strict accordance with specifications for grading of plant site, Oklahoma City Aircraft Assembly Plant, and the drawings referred to in paragraph 1-15 of the specifications."

The specifications which accompanied the signed contract contained this clause:

> "1-02 Location: *The plant site* to be graded in accordance with the plans in these specifications is located in the Southeast Quarter (SE¼) of Section Fourteen (14), and the East Half (E½) of Section Twenty-Three (23), Township Eleven North (11 N), Range Two West (2 W) of the IM, approximately seven miles southeast of the business district of Oklahoma City, Oklahoma" (R. 11).

The drawings referred to in paragraph 1-15 of the specifications were two blue prints, one known as Location Map G 2, and the other as Plat Plan G 3. The Plat Plan showed Range 29 to be the west boundary limit of the Oklahoma City Aircraft Assembly Plant and was designated in the blue print with the words "property line". Similarly, north of Station 80 is a line likewise designated as "north property line" on the blue print.

On June 17th and 18th, 1942 (R. 14 and 29), the Petitioner through their engineering department directed the Respondents to grade area No. 6. This area 6 was west of Range 29 and extended north beyond Station 80, *and all of this grading as so ordered was outside of the site of the Oklahoma City Aircraft Assembly Plant and was on the site of another Government project, to wit: Oklahoma City Air Depot or Tinker Field* (R. 30).

Respondents protested this order for a grading outside of the site but did the work as required. At the same time the Petitioner required an industrial road to be constructed north of Station 80, which was likewise outside of the area or site of the Oklahoma City Aircraft Assembly Plant. This likewise was performed. Claims were presented for work done on these two items; on the theory that there was no contract. Both claims were disallowed by the engineer and appeal taken to the Secretary of War (R. 31 & 32). The Secretary of War allowed payment for the industrial road (R. 37), but disallowed payment for the grading of the taxiway (R. 33 & 34). Suit was filed, and the Court of Claims allowed Respondents judgment as set forth in the Petition (R. 24-42).

The controversy arose, as developed in the hearings in the Court of Claims, but which was never divulged in the taxiway case before the Secretary of War, for the reason that the Government did not disclose the map which is hereinafter discussed. The interpretation and rulings of the engineer arose because of the following facts: At the time

contractors were invited to bid, the Government handed to prospective bidders a blue print with certain red pencil corrections and notations thereon (R. 31). *The Petitioner concedes that the Respondents did not receive the same copy of blue print that was given to the other prospective bidders* (R. 37 & 38). *In other words, the Respondents were never given or shown a red marked blue print until the written order to grade area 6 was issued* (R. 33).

This red marked blue print had certain corrections or notations on it in red pencil marks which changed in a very important manner three things:

(1) There was a notation which disclosed the property line as being approximately Range 36 and not Range 29, and this westward extension was marked "western limits of grading plant site" (R. 31). This new area was off the site of the Oklahoma City Aircraft Assembly Plant; and was on the site of another government project.

(2) In addition there was added a notation "taxiway grading included in grading plant site" (R. 19).

(3) Extending north and both north and west of the plant site were these additional words: "Include in grading plant site."

Respondents never received this red marked blue print (R. 37). Furthermore, this red penciled blue print was not carried forward into the completed Contract (R. 32). On the contrary, the blue prints that accompanied the Contract had no notations on them, and there is nothing to indicate any grading or excavation west of Range 29 and north of

Station 80; but on the contrary, on the designated "taxiway" which is west of Range 29 (and off the site) is shown the word in parenthesis "proposed" (R. 19 & 27). *It is conceded that at the time the Petitioner ordered the work (taxiway) done west of Range 29, which was outside of the site of the Oklahoma City Aircraft Assembly Plant; as well as at the time the claim was disallowed by the engineer, they had before them the red marked blue print (basing their ruling on it) and erroneously assumed that the Respondents likewise had been furnished a copy* (R. 32 & 36). Also the opinion of the Secretary of War disallowing the taxiway claim made no mention whatsoever of the blue print Plat Plan G 3, marked in red (R. 33). But the Secretary of War in allowing payment for the industrial road referred to the red marked blue print, and based his opinion on it (R. 34).

All of the above facts are bourne out by the findings made by the Court of Claims.

Petitioner is guilty of certain inaccuracies in his statement. On page 6, he states, "It was known by all concerned that a taxiway was to be constructed." There is no basis for this statement. And even assuming he was correct, there is no reason to assume that it was to be built off of the site.

On page 6, he asserts that "the contracting officer found the specifications and drawings clearly showed that the work under the Contract included the taxiway in question." But, that ruling was based on the erroneous as-

sumption that Respondents had been furnished a copy of the red marked blue print (R. 31).

On page 7, he refers to the industrial road as being within the air depot area. It was not (R. 31).

On the same page it is said: "The Court of Claims refused to give effect to paragraph 2-16 of the specifications." We submit that court did give correct legal effect to it (R. 39-40).

On page 8 of the Petition, the Court of Claims is accused of substituting its own judgment for that of the Secretary of War "to whom the final decision of this precise question had been specifically committed by the unambigous provisions of the specifications." We submit this statement is not proven nor correct:

(a) It assumes that standard clause No. 15 of the Contract is to be ignored, and

(b) That paragraph 2-16 of the specifications is to control.

(c) The Secretary of War "ignored" it as regards the industrial road (R. 34).

(d) The Court of Claims made a similar ruling in the *Pfotzer case*, and this Court refused *Certiorari* in December, 1948, when this identical question was raised and presented (Petition page 13 n).

ARGUMENT

We submit that there is no reason or necessity for *Certiorari*.

EQUITIES

All of the equities are in favor of the Respondents. The work was performed and the Petitioner obtained the benefit thereof and should pay for same. And the Court of Claims so found. Also, the Secretary of War, on appeal, allowed the claim for the industrial road, which claim is identical with that of the taxiway.

NO QUESTION OF IMPORTANCE

This case certainly presents no question of gravity or importance justifying the issuance of a Writ of *Certiorari*. And the Petition and brief present no special and important reasons therefor.

CONTRACTS CONSTRUED AGAINST PARTY

Even under the hypothetical question presented by the Petition in the Question Presented, which we state is not the one herein involved, a unique position is taken by the Petitioner. In the first instance, the Contract and specifications were drawn by the Government, and in the event of ambiguity the Contract should be interpreted most favorably against the party who drew the Contract and created the doubts, inconsistencies, and ambiguities.

Hollenbach v. *U. S.*,
233 U. S. 172, 158 L. ed 901, 34 S. Ct. 553;

U. S. v. *Spearin*,
248 U. S. 132, 63 L. ed. 166, 39 S. Ct. 59;
Reading Steel Casting v. *U. S.*,
268 U. S. 186, 188, 45 S. Ct. 469, 69 L. ed. 907.

ARTICLE 15 OF CONTRACT CONTROLS AND ONLY QUESTIONS OF FACT COULD BE DETERMINED BY THE ENGINEER.

In the presentation of the matter, counsel for the Petitioner, we submit, entirely begs the question. His statement of the question involved assumes a state of facts which are not proven.

The Contract as originally presented contained Article 15 (R. 9) and likewise contained paragraph 2-16 of the specifications (R. 10). That latter paragraph provided for appeals to the Chief of Engineers, United States Army and also contained this statement: "(See Article 15 of the Contract.)" As actually furnished, the Contract again contained Section 15 and contained paragraph 2-16 of the specifications, which provided for appeal to the Secretary of War, instead of to the Chief of Engineers, and left out the parenthetical reference to Article 15 of the Contract (R. 40).

The Contract further provided that the only changes could be made under Article 22 (R. 40) of the Contract, and it is inconceivable that the specifications could have the effect of modifying or changing the Contract provisions themselves. Had that been the intention, either the Contract would have been rewritten or Article 15 would have been deleted.

Furthermore, Article 15 is in the Contract and para graph 2-16 is in the specifications.

Petitioner's position is that paragraph 2-16 of th specifications controls even though the Contract still had i it Clause No. 15.

Let us analyze for the moment the meaning of specifi cations.

(a) Webster's *Twentieth Century Dictionary*, Un abridged, defines "specifications" as follows:

> "A particular and detailed account or descriptio of a thing; specifically, a statement of particulars, de scribing the dimensions, details, or peculiarities of an work about to be undertaken, as in architecture, build ing, or engineering."

(b) The courts have held as follows:

> "The term 'specifications' as used in a building con tract ordinarily means a detailed and particular ac count of the structure to be built, including the manne of its construction and the materials to be used."
>
> *Woolacott* v. *Meekin*,
> 151 Cal. 701, 91 Pac. 612, 615.

> " 'Specifications' not only embraces the dimension and mode of construction, but includes a descriptio of every piece of material, its kind, length, breadth an thickness, and manner of joining the separate part together."
>
> *Superior Incinerator* v. *Tompkins* (Tex.)
> 37 S. W.(2d), 391, 395.

(c) Let us examine our own exhibits, and we find a follows: Specifications. Special Provisions: 1-14 (R. 12)

> "*Work covered by Contract Price*—The Contracto shall, for the contract price, furnish and pay for al materials, labor and all permanent, temporary, prepar

atory, and incidental work, furnish all accessories, and do everything which may be necessary to carry out the contract in good faith, which contemplates the completion of everything in good working order completed in accordance with the plans and these specifications."

General Provisions: 2-02 (15) (R. 13):

"*Specifications*—The written description of the materials, instructions for the installation of the materials and other information pertaining to the execution of the contract which are a part of the contract documents. The specifications may be altered by supplementary specifications or addenda which will become a part of the contract when issued."

2-03 (a) (R. 13):

"*General*—It is the intent of the plans and specifications to describe a completed work to be performed under this contract. Considerable latitude is allowed in these specifications in order that there may be no unfair discrimination against the builders of different styles and types of equipment. For this reason, no omission of any detail from the specifications shall release the Contractor from furnishing any materials or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal."

It is very clear that it was never intended that the specifications were to be or mean anything other than as commonly and normally understood. That is, specifications were not intended to be a substitute for the Contract, but they were to perform their natural and normal function, to-wit: advise the contractor as regards the type, manner, and mode of work. It is not, as stated in Petition, necessary to read paragraph 2-16 out of the Contract. In their true position and function, they remain in—complementary and explanatory—as found by the Court of Claims (R. 39):

> "Paragraph 2-16 is entitled 'Claims, Protests and Appeals' and is primarily a procedural provision intended to provide an orderly method for carrying out the provisions and purposes of Article 15 of the standard formal contract. Such a paragraph in 'General Provisions' of the specifications has itself come to be standard provision, and, as we pointed out in the *Pfotzer case, supra,* the fact that the specifications, which are intended to delineate the work to be done and the procedures to be followed, are made a part of the contract by Article 1, does not warrant the conclusion that they override an express provision of the contract. Provisions such as paragraph 2-16 must, if possible, be read and interpreted in the light of and consistent with the provisions of the formal contract. When this is done, there is no conflict between Article 15 and paragraph 2-16."

On page 11 of the Petition, the beginning phrase of Article 15 is taken out of its context, and made to appear to be contrary to its clear meaning. This is misleading. It reads "except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer * * *" (R. 2). That phrase limits and modifies and refers only to disputes as to questions of fact, and clearly nothing else.

Article 15 of the Contract remained in the Contract, and there is no indication that it was to be relieved of its place or importance. On the contrary, paragraph 2-16 of the specifications merely provided to whom the appeal should be made and, properly interpreted, means that such decision shall be final and binding to the extent provided in Article 15 of the Contract. As stated above, had the

Government (which drew the contract) intended that Article 15 be changed, they could have done so by express words, or deleted it, as was done with certain other articles of the Contract.

Thus only questions of fact were to be determined by the engineer, and the interpretation of the Contract or the determination as to whether there was a contract as to the taxiway was a question of law, and not within the authority of the engineer.

Let us assume (though not admitting) that paragraph 2-16 of the specifications is to be given the effect that the Solicitor seeks. Carried out, then, to its logical conclusion, it means:

(a) That the Chief of Engineers may interpret contracts both as to law and fact, and make rulings of law. This we have always assumed is the province of the courts.

(b) Furthermore, it places the Government in the anomalous position of writing its own contracts, placing ambiguous and doubtful clauses therein, and then permitting an engineer to make legal determinations as to the limitations, meanings, and extent of its own contracts. As stated in *U. S.* v. *Lundstrom*, 139 Fed. (2d) 792, C. C. A. 9 (1943), this was hardly the intent of the Government:

> "The contract contains the following provision (similar to Clause No. 15), 'It is the position of the Government that this provision covers the dispute over the description of the materials to be hauled, that it was the duty of the Lundstrom to follow the procedure therein, and that the district court was without jurisdiction of the subject matter.' But if this were

> true, the very untenable and paradoxical situation would be present that the Government, one of the parties to the contract, would have the decision as to the meaning and extent of its contract. Provisions such as here under consideration do not relate at all to the interpretation of the Contract. Issues so arising are strictly issues of law for the courts to determine."

Furthermore, still assuming paragraph 2-16 means as the Solicitor argues, we have a situation in which the engineer makes a decision as to Respondents' liability under the Contract, on the erroneous assumption that they had been furnished a copy of the red marked blue print—which decision based on the red marked blue print required Respondents to do the grading for the taxiway outside the site of the Assembly Plant and denied extra compensation therefor. This engineer made the same ruling, using the same reasoning, in ordering the work and denying the claim for the industrial road. On appeal, the Secretary of War overruled the engineer and allowed the claim for the industrial road—but affirmed the engineer and denied the claim for the taxiway—but in his opinion on the taxiway did not refer to, nor pay attention to the red marked blue print. Although, as to the industrial road, the red marked blue print was the basis of the allowance of the claim to Respondents. These opinions cannot be reconciled. The decision of the engineer and the Secretary of War on the taxiway is arbitary and so grossly erroneous as to imply bad faith. And the Court of Claims so held by its result.

The cases cited on page 9 of the Petition are not in point as to this issue.

Statement is made to the effect that *U. S.* v. *McShain*, 308 U.S. 512, 520 is virtually on all fours with the instant case. We submit that on examination and analysis, this claim is clearly not accurate nor correct. Here we deal with a clause in the *Contract* (Article 15), which refers to questions of fact only—and paragraph 2-16 of the specifications, which apparently sets forth to whom the appeal shall go—and of more importance, the contention of Respondents that there was no contract at all as regards work to be done off the site, which clearly isn't an engineer's construction or interpretation of work to be done thereunder. In the *McShain case*, no such issue was involved. There, it was a conflict between the plans and specifications requiring an interpretation. No question as regards the contract. The Court of Claims (88 Court Cl. 284, 296, 297) said:

> "During the course of existing differences over the backfill item, the construction engineer in order to forestall an apparent delay in finishing the work requested the plaintiff in writing to proceed with the same and at the same time said 'your observance of this request to proceed with the work' will be the subject of an adjustment of the costs later on. Using a backfill of gravel increased the plaintiff's cost of doing the work by the sum of $1,877.93.
>
> "Specification 66 refers to Drawing E-404 and this drawing points out where the subsurface drains are to be installed, and does not provide for a backfill of gravel as to the tile drain to be installed underneath the center of the concrete slab.
>
> "It is admitted that a difference existed between the specifications and the work called for under the plans and this difference was as to the character of backfill over the drains. Drawing E-404 expressly discloses an

entire absence of any requirement to backfill the drainage area under the center of the concrete slab with gravel, and the determination of this question involved not a determination of facts but an interpretation of the contract, drawing, and specifications.

"The contracting officer, in order to reach a conclusion, did of necessity predicate the same by construing the specifications and drawing to exact a backfill of gravel for the drain under the concrete slab by implication. It could not have been done otherwise, for it is clear that no express language imposed this duty upon the contractor * * *.

"The plaintiff performed this extra work under protest. As a matter of fact, a proposal for performing it and the added cost involved were furnished to and considered by the defendant, and, notwithstanding the fact that subsequent to its rejection the plaintiff proceeded under the contract to obtain an extra allowance, we now think that under the decision of this court in the *Davis case, supra*, the plaintiff is entitled to a judgment for $1,877.93 for performing this extra work. The amount the plaintiff seeks is not challenged by the defendant and it will be included in the final award."

With no opinion, this Court reversed as to this item.

THIS COURT HAS RECENTLY PASSED ON THIS VERY ISSUE

This Court has already passed on this question adverse to the contention of the Petitioner.

The first case is that of *Silas Mason* v. *U. S.*, 62 Fed. Supplement 432, 105 Ct. Cl., 90 C. C. 266, cert. den.; 67 S.Ct. 43 rehearing den.: 67 S.Ct. 181, 43,329, U. S. 825, 713, 91 L. ed. 701, 619.

A more recent and almost identical case was *U. S.* v. *Pfotzer*, 77 Fed. Supplement 390, 111 Ct. Cl. 184, cert. den. Dec. 6, 1948, 335 U.S. 885.

The opinion in our case was based on the *Pfotzer case*, and so stated by the Court of Claims (R. 39). In that case the Court of Claims made the following statement:

"A few words should be said with reference to the argument of defendant that the decisions of the contracting officer and the Board of Contract Appeals, acting for the Secretary of War, were final and conclusive as to all the claims involved, under Article 15 and paragraph 1-07 of the Specifications, Section I, Part I, General Provisions, etc.

"(11) We do not agree. Article 15 of the standard contract form, entitled 'Disputes,' provided in part: Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

"Under this article the finality of decision was clearly limited to questions of fact or factual issues. There was no other provision in the standard contract which 'otherwise specifically provided.' But defendant argues that paragraph 1-07, *supra*, was a provision 'in this contract' which 'otherwise specifically provided.' Paragraph 1-07 read: 1-07 Interpretation of Contract; Unless otherwise specificially set forth, the Contractor shall furnish all materials, plant, supplies, equipment, labor, etc., necessary to complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the Contracting Officer shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

"It is true that the specifications were, by Article 1, of the printed standard form of contract, made a part thereof, but the specifications and drawings were made

a part of the contract for the purpose of detailing the work to be performed and the materials to be furnished, and we think this is evidence against rather than in favor of defendant's contention. If it had been intended that a provision in a specification should override an article in the formal contract, we think such intention would have been expressed, or that the specifications would have been mentioned in Article 15. Where Article 15 mentions 'this contract,' it means the 'Standard Form 23' and not the specifications. Otherwise all the labor and study that entered into the formulation, preparation and adoption of the standard form of Government contract by the Departmental Board of Contract and Adjustment for approval by the President, would have been left to the whim of the specification writer. See *Harwood-Nebel Construction Co.* v. *United States*, 105 Ct.Cl. 116.

"(12) The court will take notice, from the many cases brought here, of the fact that the Standard Form of Construction Contract, Form 23, was first adopted and approved by the President in 1926, and that form contained Article 15, as it is written into the present contract, Form 23. Article 15 states a rule of policy. It is only under Article 22, that the Government, acting through the contracting agency or the head of the department, may, as a matter of policy, add additional articles as 'Alterations.' Without any other aid than the standard contract form itself, we think it is manifest that the Government intended that the provisions of the standard form, and the policies stated therein, would be paramount to the specifications and would govern in case of inconsistency or conflict. *Loftis* v. *United States*, Ct. Cl., 76 F. Supp. 816. But we are not compelled to rely upon this general rule of implied intention. The view is supported by the express provision of the standard printed 'Directions for Preparation of Contract' which were formulated and issued with the original standard contract forms. The present contract is 'Form 23, Revised, Approved by the Secretary of the Treasury, September 14, 1940.' On the back of the last page thereof is printed the 'Directions

for Preparation of Contract,' paragraphs 1, 2, 3, and 15, of which are as follows:

> "1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.
>
> "2. There shall be no deviation from this standard form, except as provided for in these directions, and except as authorized by the Director of Procurement. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled 'Alterations' before signing. This article is not to be construed as general authority to deviate from the standard form.
>
> * * * * *
>
> "3. The blank space of article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.
>
> * * * * *
>
> "15. Additional contract provisions and instructions, deemed necessary for the particular work, not inconsistent with the standard forms nor involving questions of policy, may be incorporated in the specifications or other accompanying papers."

"From the foregoing it is clear that the interpretation referred to in paragraph 1-07 of the specifications only related and was intended to relate, as its provisions show, to the furnishing by the contractor of materials, plants, supplies, equipment, labor, etc., necessary to complete the work in accordance with the drawings and specifications. This had to do with the performance of the work in an accurate and speedy manner and was for the purpose of putting the contractor on notice that he would be required to perform the work and diligently proceed therewith ac-

cording to the directions of the Government's contracting officer and not according to his own views about what might be necessary under the plans and specifications. The contractor might dispute the directions of the contracting officer but he had to proceed with the work and obey the contracting officer's directions concerning performance, based upon his interpretation or opinion as to 'the true intent and meaning of the drawings and specifications.' The ultimate settlement and decision of the disputes arising under the contract was another matter which was to be governed by Article 15. Under this article, as we have held, the conclusive nature of the decisions on claims was limited to disputes 'concerning questions of fact,' as distinguished from questions involving interpretations or the law of the contract, as those terms are usually and generally construed and applied by the courts. *Williston on Contracts*, Vol. 3, § 616; *Albina Marine Iron Works* v. *United States*, 79 Ct. Cl. 714, 722; *Callahan Construction Co.* v. *United States*, 91 Ct. Cl. 538, 616; *Schmoll* v. *United States*, 91 Ct. Cl. 1, 33; *John K. Ruff* v. *United States*, 96 Ct. Cl. 148, 165; *B-W Construction Co.* v. *United States*, 97 Ct. Cl. 92, 118; *John McShain, Inc.* v. *United States*, 97 Ct. Cl. 281, 295.

"Paragraph 1-07 obviously had nothing to do with claims, protests, disputes and appeals, with reference to amounts due. It did not purport to make final and conclusive the contracting officer's interpretation of the plans and specifications with reference to these matters. Its purpose was to keep the work going without interruption and to avoid disputes as far as possible."

The case herein is almost identical. The directions for preparation of Contract are absolutely identical. The questions raised were identical, and the same reason and ruling was given by the Court of Claims.

The Petitioner seeks to distinguish the cases. But his analysis is not sound. In the *Pfotzer case*, Petitioner states

the Respondents consistently stressed that the dispute did not involve any question as to what work was required under the Contract, but solely a controversy over the unit of payment for the work. Here the question is not as to what work was required under the Contract, but a consistent position that there was no contract for any work done outside of the limits and boundary of the plant site, as defined in the Contract and specifications. The same issues were raised and argued in the Court of Claims, and adverse rulings made thereon contrary to the position of the United States. This Court ruled on the very same issues as raised, and denied *Certiorari* in December, 1948. There is no new issue, and there is nothing justifying a Writ of *Certiorari*.

We submit the argument (Petition, page 14) as to this, and other decisions rendering judgments for work done, having the effect of weakening and narrowing the effectiveness of a policy of the Government to settle contract disputes without expensive litigation is again begging the question. Congress created the Court of Claims; enacted the Tucker Act; and the Contract Settlement Act of 1944.

And the statement in the note at page 14 of the Petition that by this decision the Court of Claims, in the teeth of explicit contract provisions, refused to follow an administrative determination that certain work was required by the plans and specifications, likewise begs the question. This Court did not so find in refusing *Certiorari* in the *Pfotzer case, supra*. Here, likewise, the Court of Claims didn't find

such explicit contract provision—nor any basis for such administrative determination.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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JULY, 1949.